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Ans. David Modrell
To Pet. John Din

April 26. 1766.

ANSWERS

FOR

DAVID MODREL of *Muir-miln*;

TO THE

PETITION of *John Din* Portioner of *Easter Craigannet*.

IN order to answer this petition properly, it seems neceſſary for the reſpondent to begin, with giving your Lordſhips a full ſtate of the facts and deeds that gave riſe to this cauſe, as even from thence alone the juſtneſs and propriety of the Lord Ordinary's interlocutors will be abundantly apparent.

The TenShilling Land of Eaſter Craigannet, called *Glendales*, formerly belonged to Andrew M'Lay, from whom the reſpondent derives right by a clear progreſs.

Of this date, Janet Adam, mother to the ſaid Andrew M'Lay, granted bond to the now deceaſt John Liddel, for the principal ſum of 1390 Merks; and altho' it does Nov. 7. 1731.

not appear what right of property Janet Adam had in the lands of Glendales; yet, by the ſame bond, ſhe became bound to inſett Liddel in theſe lands for his further ſecurity of the ſaid debt, principal and intereſt.

Jan. 31. 1733. Of this date, the ſaid Andrew M'Lay himſelf granted an heretable bond upon the ſaid lands of Glendales, to the ſaid John Liddel, for the ſum of 600 Merks Scots.

Upon theſe two heritable bonds John Liddell was infeft;

Aug. 10. 1737. and, of this date, he obtained a decreet of poinding the ground before the ſheriff of Stirling, againſt the tenants and poſſeſſors, and againſt the ſaid Janet Adam, and Andrew M'Lay. Liddel was further about to adjudge the land; and, by this rigorous diligence, he ſoon obliged M'Lay and his mother Janet Adam, who liferented a pendicle of 30*l.* Scots yearly, to enter into a tranſaction, and grant him a diſpoſition of the ſaid lands, which is now the ſubject of the preſent queſtion.

Nov. 14. 1737. This diſpoſition recites the two heritable bonds above-mentioned, aud decreet of poinding of the ground; and ſets forth, that the ſaid John Liddel had likewiſe raiſed, and execute, *a ſummons of adjudication*, for adjudging the ſaid lands; that the ſaid Andrew M'Lay was liable in payment of both the ſaid bonds, the amount whereof and expences then extended altogether to the ſum of 1600*l.* Scots: And that the ſaid Janet Adam and Andrew M'Lay, "foreſeeing what would be the effect of the ſaid *decreet of* "*adjudication*, and the expences that would be accumula-"ted on him, the ſaid Andrew M'Lay thereby, and be-"ing moſt willing and deſirous *to prevent the ſame*, and to "do all manner of juſtice to the ſaid John Liddell, had "therefore agreed to grant him the ſecurity under-"written."

Upon this narrative, the ſaid Andrew M'Lay did thereby, "*without prejudice to the ſaid two heritable bonds*, de-"creet of poinding, or further diligence that had, or "might

" might follow thereon," accumulate the ſaid two debts, principal and intereſt, into one principal ſum of 1600 *l.* Scots, which he bound himſelf to pay to the ſaid John Liddell, within the years of the reverſion after-mentioned. Further, for the ſaid John Liddel's better ſecurity, the ſaid Andrew M'Lay, with conſent of his mother, diſponed to the ſaid John Liddel, his heirs and aſſignies, the ſaid lands of Glendales, but redeemable always, and under reverſion by M'Lay and *his heirs and ſucceſſors*, by payment or conſignation, " of the ſaid ſum of 1600 *l.* Scots, and annu-
" alrents thereof, and that at any term of Whitſunday or
" Martinmas betwixt, or upon the term of Martinmas
" 1742 allenarly, upon 40 days premonition, *&c.* reſerv-
" ing to the ſaid Janet Adam her liferent-right of that part
" or portion of the ſaid lands preſently poſſeſſed by her;
" and which is valued to be 30*l.* Scots of yearly rent."

Further, in caſe the ſaid Andrew M'Lay, or his foreſaids, ſhould fail or neglect to redeem the ſaid lands within the ſpace foreſaid, he thereby ſold and diſponed the ſaid lands to the ſaid John Liddel and his foreſaids, heritably and irredeemably, without neceſſity of declarator, reſerving to the ſaid Janet Adam her foreſaid liferent-right; and with this *proviſo*, that, in caſe the ſaid lands ſhould fall abſolutely and irredeemably to the John Liddell through the not redemption thereof, that the ſaid John Liddel ſhould be bound to pay Margaret Provan, her heirs and aſſignies, the ſum of 600 Merks Scots, with what annualrent ſhould happen to be reſting thereon, contained in an heritable bond granted by the ſaid Andrew M'Lay to her, affecting the ſaid lands; " And which
" accumulate ſum above written, with the ſaid ſums
" due to the ſaid Margaret Provan, are thereby declar-
" ed, in the event of the not redemption, to be the full
" and adequate price and value of the ſubject thereby
" diſponed."

Of

Nov. 14. 1737. Of the ſame date with the diſpoſition above-recited, the ſaid John Liddel granted to the ſaid Andrew M'Lay, and Janet Adam his mother, a general diſcharge of all clags, claims, debts and others, which he could anyways aſk, claim, or crave of them; *excepting alwiſe therefrom, the two heritable bonds above-mentioned*, the decreet of poinding the ground, and diſpoſition aforeſaid; and declaring, that the ſaid diſcharge ſhould be noways prejudicial to the ſaids *two heritable bonds, ſums therein contained, &c. nor to what may follow thereon.*

The ſaid John Liddel was infeft on the foreſaid diſpoſition the very day on which it was granted, and immediately entered to the poſſeſſion of the lands; and he and his ſucceſſors have ever ſince continued to poſſeſs the ſame, although of much greater value than the debts aforeſaid.

Soon after the above tranſaction, Andrew M'Lay was obliged to leave Scotland, and never returned thereto. He left behind him a wife and two infant ſons, from the eldeſt of whom William M'Lay, the reſpondent, derives right by diſpoſition. This family continued long in a diſtreſſed ſituation. While Andrew M'Lay himſelf lived, they had no title to redeem the lands, neither were they poſſeſſed of funds to do it; and neither they, nor M'Lay himſelf, had any bond of reverſion, or other deed upon which an order of redemption could have been executed, no writings having been given to Andrew M'Lay, but the general diſcharge above-recited.

However, the ſaid Andrew M'Lay having died abroad, and his eldeſt ſon, William M'Lay, having lately come of age, and made up his titles by precept of clare and infeftment, as heir to his father, he granted a Oct. 5. 1764. diſpoſition of the ſaid lands to the reſpondent Mr Modrel, who thereupon brought this action againſt John Din the Petitioner, heir and ſucceſſor of the ſaid John Liddel, concluding,

Concluding, for exhibition of the deeds above-recited, and to have the lands found to be redeemable, and the petitioner ordained to account for his and his predeceſſors intromiſſions; and to renounce and make over the ſaid lands to the reſpondent, upon it's being found, that the foreſaid debts are paid and extinguiſhed by the ſaid intromiſſions; or, upon payment being made of any balance thereof that may be found to be due and reſting.

This proceſs came of courſe before the Lord *Auchinleck* as Ordinary; and, as it ſeemed material to the cauſe, that the extent of the rental of the lands ſhould be aſcertained, a proof was allowed on that point, which having been taken, and the writs called for produced, and memorials given in upon the whole, his Lordſhip pronounced this Interlocutor; finds, "*From the tenor of the diſpoſition granted by* Andrew M'Lay *to* John Liddel, *joined with the amount of the price, not being quite twenty years purchaſe, in the year* 1737; *there is ſufficient evidence, that* Andrew M'Lay *did not intend to make a ſale of his lands, but only to obtain a delay of diligence from* John Liddel *his creditor; and therefore, that the clauſe by which the lands are declared to be irredeemable, in caſe* M'Lay *did not pay up this debt to* Liddel *within the time limited, is to be conſidered as penal; and that it is competent to the purſuer, as in the right of* M'Lay, *to redeem the lands upon payment of the ſum truly due, after diſcounting the intromiſſions had by the defender and his predeceſſors.*" And to this Interlocutor his Lordſhip *adhered*, upon adviſing repreſentation and anſwers.

Dec. 20. 1765.

Febr. 13. 1766.

In anſwering the defender's reclaiming petition againſt theſe Interlocutors, the firſt and moſt material point to be conſidered is, Whether the equity of redemption was forecloſed by the not uſing the order at or before Martinmas 1742, although no declarator of irritancy has yet been obtained by the petitioner; or, Whether it is ſtill

competent for the reſpondent, as in right of the original reverſer, to redeem the ſaid lands. Now, that the irritancy ſtipulated was *penal*, and conſequently that the redemption is competent, will appear to your Lordſhips from the facts above ſet forth, and the following obſervations.

1*mo*, It is clearly proved by the expreſs tenor of the diſpoſition itſelf, and other writs above-mentioned, that no proper and abſolute ſale of the lands was intended by M'Lay the proprietor, but that he was compelled to grant that diſpoſition to Liddel his principal creditor, who had already a great heritable ſecurity upon his eſtate: Every part of the tranſaction declares ſo much; and, it is at once put beyond all diſpute, by the narrative of the diſpoſition itſelf, which mentions as the cauſe of granting it, that Liddel had actually *raiſed a ſummons of adjudication*, and that the deed was given by M'Lay, to *prevent* the effect of his obtaining decreet of adjudication.

The petitioner indeed is forced to admit, p. 11. "That 'the diſpoſition in queſtion was originally a right in ſe-'curity, and not a true ſale at an adequate price." But he, at the ſame time, pretends, that in the event of not redeeming the lands at Martinmas 1742, it was agreed, that a true contract of ſale ſhould be then concluded betwixt the parties. The reſpondent muſt however confeſs, that he cannot well comprehend, how, if the diſpoſition was originally only a right in ſecurity, and not a ſale at an adequate price, it could change its nature after Martinmas 1742, ſo as to become then a true contract of ſale, without any ſuch addition being made to the price as could render it adequate, nor any alteration of circumſtances interveening, further than an increaſe in the value of the lands, which rendered the debts due in the 1737, a ſtill more inadequate price in the 1742, and the irritancy

ſtill

ſtill more penal. The ſtipulating a right of reverſion plainly ſhews, that M'Lay was unwilling to part with the property of his lands if he could avoid it, and the limitation of that right to ſo ſhort a time, muſt have proceeded not from the choice of the debitor, but the compulſion of Liddel the creditor, who was then thought to have the power of forthwith evicting the ſubject by diligence altogether. Under ſuch circumſtances, the reſpondent's plea muſt appear in the moſt favourable light, as tending to prevent a rigorous creditor from carrying off his debitor's lands for much leſs than their value.

2*dly*, This tranſaction differed eſſentially from a fair and proper ſale under reverſion; not only, as being, *ex facie*, an impignoration of lands in ſecurity of an anterior debt, but in ſundry other reſpects, which affords ſtrong exceptions to the giving force to ſuch an irritancy as was thereby ſtipulated.

Thus, although, by the narrative of the deed, the reaſon of granting it was to prevent an adjudication, and ſo, in effect, to ſupply the place of ſuch an adjudication; yet a greater hardſhip was impoſed on the debtor, than if that diligence had been *expede*: for, an adjudication would have been redeemable during ten years; whereas, by this deed, the reverſion was limited to five. Again the debitor or reverſer was not furniſhed with any back-bond or deed upon which he could uſe an order of redemption, the only deed containing the reverſion being the diſpoſition itſelf, which remained in the cuſtody of Liddel the creditor, and is not regiſtrate at this day. Further, as the cauſe of granting this diſpoſition was for ſecurity, or, in caſe of not-redemption, in ſatisfaction of the two heritable bonds due to Liddel, and the other bond due to Margaret Provan; ſo M'Lay ought to have had a diſcharge of all theſe debts, in the event of the diſpoſition proving abſolute. On the contrary,

contrary, your Lordſhips ſee, that this ignorant man M'Lay, was made to accept of a diſcharge, which expreſſly reſerved the two bonds due to Liddel himſelf, *with all that had followed, or ſhould follow upon them*, as in full force againſt him and his mother, without any limitation: So that, even ſuppoſing the right of redemption to have expired at Martinmas 1742, yet they remained ſtill liable for theſe debts, as much as if the diſpoſition in queſtion had never been granted.

3*tio*, In the event of not-redemption at Martinmas 1742, Liddel became bound to pay Margaret Provan's debt of 600 Merks Scots, with whatever intereſt ſhould be due upon it. This ſhews that Liddel was ſenſible, that his own debt of 1600 *l.* with the principal of Provan's debt, was not an adequate price for the lands, ſince he was willing alſo to pay whatever intereſt might be due to Provan; beſides allowing Janet Adam to poſſeſs her liferent lands ſo long as ſhe ſhould happen to live. But further, this engagement to pay Provan's debt, was no voluntary addition, with the view of completing the payment of an adequate price in the event of not-redemption, but a ſtipulation unneceſſary, otherwiſe than to ſhew ſtill clearer, that M'Lay intended to give no more than a ſecurity for Liddel's debt, ſeeing Provan's debt ſtood heritably ſecured on the lands preferable to Liddel's own debt; and conſequently muſt have been paid off by Liddel in the event of his acquiring the property, by the penal irritancy taking effect, whether there had been ſuch an article in the diſpoſition or not.

M'Lay's ignorance as to his own affairs at the time of this tranſaction, alſo manifeſtly appears from this clauſe reſpecting that debt, which, by the diſpoſition, is declared to be due to "*Margaret Provan, relict* of *John Thomſon* in *Eaſter Craigannet*, her heirs and aſſignies:" whereas, there

there is produced by the petitioner, an aſſignation and renounciation granted to him in the 1745 by *John Thomſon, eldeſt ſon and heir ſerved to the deceaſed John Thomſon in Eaſter Craigannet*, of an heritable debt of 600 Merks on the ſaid lands, contracted by the ſaid Andrew M'Lay: the principal ſum being the ſame with that mentioned in M'Lay's diſpoſition, as due to Margaret Provan, the widow of the ſaid John Thomſon: it is probable, that the petitioner holds it to be the one intended in M'Lay's diſpoſition, although no mention is made in Thomſon's aſſignation of Provan's name; and if ſo, the debt muſt have been truly due to the huſband and not to his widow; if it is otherwiſe, the debt due to Provan, for ought appears, may be ſtill outſtanding.

And, 4*to*, What *per ſe* puts it beyond all doubt, that M'Lay did not intend a ſale of his lands, but only a right in ſecurity to ſuperſede Liddel's diligence; and conſequently, that the irritancy provided of his right of redemption was highly *penal*, is the evidence ariſing from the rental of the lands, that both the total value and yearly rent far exceeded the principal and yearly intereſt of the debts above-mentioned. Your Lordſhips will notice, that the principal of the debt due to Liddel himſelf, was declared to be 1600 *l. Scots*, and the principal due to Provan 600 Merks, or 400 *l.* Scots, making together exactly 2000 *l.* Scots; and conſequently, that the yearly intereſt thereof amounted to 100 *l. Scots*, or 8 *l.* 6 *s.* 8 *d. Sterling*, which the reſpondent ſhall compare with the rental, both at the time of the tranſaction and as it now ſtands.

With regard to the old rent at and preceeding the 1737, it appears from the oath of William Knox, that he paid 5 *l.* 15 *s. Sterling* for a part of the lands; and it is alſo proved, that 3 *s.* 4 *d. Sterling* was then paid by another perſon for the rent of two Knows. John Provan, another tenant at that time, is proved, by his tack, to

have paid 1 *l.* 13 *s.* 4 *d. Sterling*; Alexander Lindſay, by his tack, 5 *s.* 6⅔ *d. Sterling*; and James Liddel, by his tack, 50 merks, or 2 *l.* 15 *s.* 6⅔ *d. Sterling*, making altogether 10 *l.* 12 *s.* 9⅓ *d. Sterling*, beſides the publick burdens and ſervices alſo payable by the tenants. To this ſhould likewiſe be added the rent of the lands liferented by Janet Adam, being 2 *l.* 10 *s. Sterling*, as Liddel was to have right to them upon expiring of her liferent, making in whole about 157 *l.* 13 *s.* 4 *d. Scots*, or 13 *l.* 2 *s.* 9⅓ *d. Sterling*.

As to the deductions, the tenants paying the public burdens, beſides their rent, there fell nothing to be deduced but 2 *l. Scots* of feu-duty, and 1 *l.* 10 *s. Scots* of tiend-duty, payable to his Grace the Duke of Montroſe, who is ſuperior of the lands, and who does now hold, and has for many years paſt held by tack the tiends of the whole barony within which the lands lye. The extent of this feu and tiend-duty, is aſcertained by a certificate from the Duke's factor, dated in March laſt, and by receipts, ſome as far back as the 1700.

The petitioner indeeds calls the feu-duty 7 *l.* Scots, which muſt proceed, either from a miſtake, in including the feu-duty of other lands than thoſe in queſtion, which were contained in the ſame original feu-charter; or from adding to the real feu-duty 5 *l.* Scots, as the converſion of two carriages mentioned in the feu-charter and certificate; but which are only declared to be due *if required*, and therefore cannot be regarded, and would be performed by the tenants, if required. The petitioner's deduction of 30 *l.* 16 *s.* Scots, as the fifth of the rent in name of tiend, is alſo groſly erroneous, conſidering that the tiends are in tack, and no more is, or has been paid for them than the ſtipend, and 1 *l.* 10 *s.* of duty uplifted by the Duke of Montroſe. Neither is it true, that the petitioner has been called in a proceſs at the inſtance of

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Lord Erſkine reſpecting thoſe tiends; though the reſpondent is indeed called in ſuch a proceſs, but has no cauſe to apprehend danger from it.

Thus, it is evident, that the only true and proper deduction which fell to be made from the above old rental, was the 3*l.* 10*s.* Scots, or 5*s.* 10*d.* *Sterling* of feu and tiend-duty, whereby the old rent, even excluſive of the liferent, amounted to 10*l.* 6*s.* 11$\frac{1}{3}$*d.* Sterling, and exceeded the 100*l.* Scots, being the intereſt of the debts, in about one fifth, or 2*l.* 0*s.* 3$\frac{1}{3}$ *d.* Sterling. But, as Janet Adam the liferenter was near 70 years of age in the 1737, the rent of her lands falls to be added, being 2*l.* 10*s.* Sterling, which makes the excreſs beyond the intereſt above a third of the rent, or 4*l.* 10*s.* 3$\frac{1}{3}$*d* Sterling *per annum*; which, by this bargain, the poor debtor was to have forfeited and been deprived of, without getting any value whatever, if the irritancy took effect. Indeed, ſuppoſing Liddel was to have the abſolute property in the 1742, after poſſeſſing that ſurplus rent from the 1737; it is evident, that he would have got the lands at a price ſcarce equivalent to 13 years purchaſe: And, as this clearly appears from the proof of the rental led in the beginning of the cauſe, compared with the extent of the debts, the petitioner ſurely cannot be ſerious in propoſing, that your Lordſhips ſhould allow him a new proof, by the opinion of witneſſes, that thoſe debts were adequate to the value of the lands at Martinmas 1742; although, were ſuch a proof ſtill competent or neceſſary, the reſpondent could undertake to prove, that inſtead of 2000*l.* being the amount of the debt, the lands were then well worth 3000*l.*

Again, if the preſent rental is conſidered, the advantage ſought by this penal irritancy would appear ſtill more enormous. It is proved by the oath of David Liddel, That he and his ſon poſſeſſes a part of the lands, for which

which, beſides ceſs, ſtipend, and other publick burdens, they pay 10 *l.* 6*s.* 8*d.* Sterling of rent, and paid 9 *l.* 1 *s.* Sterling of graſſum for a tack of only 11 years; to this, adding the rent of the lands formerly liferented by Janet Adam, who died ſometime ago, amounting to 2*l.* 10*s.* Sterling, and only 20*s.* for the graſſum, the whole amounts to 13*l.* 16*s.* 8*d.* Sterling; and deducing 5*s.* 10*d.* of feu and tiend-duty, the free rent is, 13 *l.* 10*s.* 10*d.* and the intereſt of the debts being only 8*l.* 6*s.* 8*d.* Sterling, the preſent free rent exceeds the ſame in 5*l.* 4*s.* 2*d.* Sterling, which is more than one third of the whole rent.

Laſtly, As to the 200 Merks, which the petitioner would have taken in *computo* with the debts, as part of the price; the petitioner's own ſtory is ſufficient to ſhow, that no regard can be had to it. The agreement produced concerning that 200 Merks, is confeſſedly no part of the original tranſaction in 1737, now in queſtion, nor is it alledged, that Andrew M'Lay was any ways concerned in it; neither are Helen Adam nor her ſiſter Iſabel, who was M'Lay's wife, parties to that agreement, which is in itſelf utterly informal and improbative: It is dated in December 1742, and bears to be ſigned by the petitioner or his predeceſſors, and one Thomas Adam; and ſets forth, that it had been formerly agreed between them, that, if the lands were not redeemed at Martinmas 1742, the petitioner ſhould pay 100 Merks to M'Lay's wife and the ſaid Thomas Adam; beſides another 100 Merks, ſaid to be already paid to them, to be applied for the education of M'Lay's ſon; but there is no voucher whatever of that ſecond 100 Merks having been ever paid. If this proves any thing, it proves, that the petitioner's author had been conſcious, that the lands were worth much more than the debts, and was therefore inclined to bribe M'-

Lay's

Lay's friends in his abſence, to let the irritancy take place. The ſame thing alſo appears, from what the petitioner ſays of his then getting up from Helen Adam, a diſpoſition, which Andrew M'Lay had granted to her in April 1742; for that diſpoſition, which is in proceſs, bears to have been granted for the expreſs purpoſe of purſuing an exhibition, and uſing an order of redemption againſt the petitioner, even within the time limited; and were there any colour for adding theſe 200 Merks to the debts mentioned in the diſpoſition 1737, it is plain, that the whole would ſtill fall greatly ſhort of an adequate price for the lands, either in the 1737 or 1742.

From what has been ſaid, it is inconteſtible, that an actual ſale never was intended by M'Lay, and would have been moſt unequal and unjuſt at ſuch a price, and that the irritancy of the right of redemption ſtipulated in the the diſpoſition was highly rigorous and penal; and that being ſo, the conſequence is clearly in the reſpondent's favours. When lands are wadſet or impignorated for ſecurity of debt, with ſuch an irritant clauſe as this, whereby the right of redemption is cut off after a certain term, this Court has been in uſe to allow the redemption ſtill to take place, if it has not been forecloſed by a declarator, even although it was ſtipulated, that no declarator ſhould be neceſſary. By the civil law the *pactum legis Commiſſoriæ in pignoribus*, was altogether reprobated; and although antiently our law inclined to ſupport ſuch irritancies; yet, by the more equitable practice of later times, we have approached nearer to the civil law, excepting when a fair ſale was intended, an adequate price paid, and a limited reverſion granted, merely *ex gratia* of the purchaſer: In every other caſe, when a ſecurity for debt ſeems to have been meant, the irritancy has been juſtly

conſidered as penal, and therefore allowed to be purged at any time before declarator.

Book 1. Tit. 13. § 14. Thus Lord Stair obſerves, "That clauſes irritant are 'reduced to equality, and reſpect is not had to the terms 'and expreſſions of the contract, but to the thing truly 'done: and therefore, though ſale with a reverſion be 'expreſſed; yet if there be not a competent equivalent 'price, and that it be not a real and proper ſale, but on-'ly a wadſet under that conception, the clauſe irritant 'hath no further effect than is before expreſſed: but if it 'be a true ſale, and competent price, the clauſe irritant 'is not penal, but hath its full effect; whereas, *otherwiſe* '*it is ſtill purgeable till declarator*, which therefore is neceſ-'ſary, *even though the clauſe irritant bear, that the reverſion* '*ſhall be null without declarator*, for the remedying the exor-'bitancy of ſuch clauſes irritant, which muſt be a proceſs 'to declare the ſame, that the reverſer may purge at the 'bar, or loſe the reverſion." And many deciſions in ſupport of this rule are collected in the dictionary, Title *Irritancy*.

The reſpondent humbly hopes, that he has thus, to your Lordſhips ſatisfaction, removed the leaſt room for doubt of the propriety of the Lord Ordinary's interlocutor upon the great point in the cauſe, finding, That the lands are ſtill to be conſidered as redeemable. It remains only to add a few words on the other points diſputed in the petition, namely, the reſpondent's title to uſe redemption, and the obligation on the petitioner to account for his intromiſſions.

As to the objection to the reſpondent's title, it could be of no avail to the petitioner, were he to prevail in it, as William M'Lay the reſpondent's author, ſon and heir of Andrew M'Lay the original reverſer, and failing him any other of Andrew's heirs, would be unqueſtionably intitled

to

to redeem, if the reſpondent were not; and would as certainly do it. Lord Stair, and Sir George M'Kenzie, in the paſſages referred to in the petition, where they ſay, that reverſions are *ſtrictiſſimi juris*, and do not go to aſſignies unleſs expreſſed, muſt be ſuppoſed to have had in their view, reverſions granted *ex gratia* by a purchaſer at an adequate price. Indeed as, by the modern practice, reverſions of every kind, are ſuffered to be carried by adjudication, there is no reaſon why a reverſion of the preſent kind, ſtipulated by a debtor, in a right granted merely in ſecurity, ſhould not paſs to his aſſignies, voluntary as well as legal. Beſides, the real right to the lands ſtill remained with Andrew M'Lay, burdened with the petitioner's baſe infeftment; and William, the ſon of Andrew, was alſo infeft, and having diſponed the lands to the reſpondent, he has thereby a good title to clear them of this incumbrance. But the clauſe of the redemption itſelf in the diſpoſition 1737 determines the queſtion, as it provides, that the ſame ſhall be competent to the granter, and *his foreſaids*, referring to his *heirs and ſucceſſors* mentioned in the preceeding diſpoſitive clauſe; and ſurely the word *ſucceſſors* muſt in this, as in other deeds relative to lands, extend to ſingular ſucceſſors or aſſignies.

With regard to the laſt point, namely, whether the petitioner ſhall be accountable for his intromiſſions, and thoſe of his predeceſſors, with the rents, in ſo far as the ſame exceeded the intereſt of the debts; or, if the lands ſhall be only redeemable upon payment of the whole ſums due to him at Martinmas 1742; this queſtion is of conſiderable importance to the reſpondent, as is evident from the above ſtate of the rental, compared with the intereſt of the debts; and the reſpondent hopes, your Lordſhips will find, that there is neither law nor equity to ſupport the petitioner, in pocketing, *ſine cauſa*, near a third

of

of the rents for ſo many years, at the expence of his debtor.

It is admitted, that the petitioner was accountable for the ſurplus rents between the 1737 and the 1742, and the reſpondent muſt acknowledge, that he cannot ſee any juſt ground for diſtinguiſhing between the rents of thoſe years and the ſubſequent ones. If the petitioner was liable before the 1742, becauſe the diſpoſition was then only a right in ſecurity, the ſame muſt be the caſe after it, ſince it is only upon the ſuppoſition that the deed did not then change its nature, but ſtill continued a ſecurity, that the lands are at all capable of being redeemed. If the irritancy, being evidently penal, can have the effect of preventing the right of redemption from being forecloſed, without declarator, it muſt alſo have the effect of preventing the debtor from incurring a partial forfeiture of the ſurplus rents, while there is no declarator againſt him; and conſequently, the creditor can only juſtly aſk payment of his principal and intereſt, ſo far as not already received, which indeed is all that the clauſe of reverſion itſelf declares to be payable upon redemption.

In the caſe of a ſale for an adequate price, or in that of a proper wadſet, things would ſtand upon a different footing, as the purchaſer or wadſetter would, *ex contractu*, have right to the whole rents, without being accountable. But this is proved to have been no ſale at an adequate price; neither is it a proper wadſet. It is merely a diſpoſition in ſecurity, which obliges the diſponee to impute in payment of his debt, every farthing he draws from the ſubject. Had the rents fallen ſhort of the intereſt, it is clear, that, by the expreſs clauſe of reverſion, the petitioner muſt have made up that deficiency at redeeming; and therefore to allow the creditor on the other hand to enjoy the ſurplus rents, when they happen to exceed the intereſt

intereſt without accounting, would be converting this right in ſecurity into an uſurious wadſet, ſuch as is expreſsly reprobated by the Act 62. Par. 1661.

In fine, there is no room here for the petitioner's pleading, that the ſurplus rents are *bona fide conſumpti*, by him or his predeceſſors believing themſelves to have the property of the lands. They muſt be preſumed to have known, that their right was only a ſecurity, and ſtill redeemable upon the terms of the original clauſe of redemption, that is, of their receiving payment of their debt, while no declarator of irritancy was obtained: They therefore are not on a ſimilar footing with thoſe who have poſſeſſed, on a right of property, apparently good, but which comes to be overthrown upon ſome ground, before utterly unknown to them. Beſides, if the petitioner or his predeceſſors could be ſuppoſed to have miſtaken the nature of their own right in point of Law, it would not be a ſufficient cauſe for depriving the reſpondent, or his cedent, of the benefit of thoſe rents which the petitioner could only legally receive *in ſolidum* of the debt. Lord Stair obſerves,

B. 2. Tit. 1. § 24. "That when, by a common or known law, the title is "void materially, in this caſe the poſſeſſor is not eſteem-"ed to poſſeſs *bona fide*, it being ſo evident; *nam ignorantia* "*juris non excuſat*: As if a relict ſhould poſſeſs lands or o-"thers, the marriage being diſſolved by her huſband's "death within year and day.—Nov. 16. 1733, *Grant.*" Nor can the reſpondent find any example, where an irritancy of a right of redemption in any other contract than a proper wadſet, was kept open as penal, and the creditor or wadſetter was not alſo obliged to account for his intromiſſions, or impute them in payment.

In reſpect whereof, &c.

DAVID RAE.